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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

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~~Nos. 445, 484 and 543~~

~~No. 445.~~ 15 1966

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.,
Appellants,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

~~No. 484.~~ 17

CALUMET HARBOR TERMINALS, INC. AND NORTH PIER TERMINAL COMPANY,
Appellants,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

~~No. 543.~~ 20

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Appellants,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.,
Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

FURTHER MOTION TO AFFIRM.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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FURTHER MOTION TO AFFIRM.

Appellees, Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, pursuant to Rule 16 of the revised Rules of the Supreme Court of the

United States, reiterate the Motion made in their original Motion to Affirm and again move that the final judgment and decree of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT.

This additional Motion to Affirm on behalf of appellees, Chicago, Rock Island and Pacific Railroad Company (Rock Island) and Pullman Railroad Company (Pullman), is made necessary because of certain statements appearing in the Jurisdictional Statement of the United States of America and the Interstate Commerce Commission (hereinafter sometimes referred to collectively as the Government), which statements are not supported by the record in this cause. The Jurisdictional Statement of the Government was received by Rock Island* on September 8, 1965, twenty-eight days after receipt by Rock Island of the Jurisdictional Statement of the railroad appellants. Rock Island filed its original Motion to Affirm on September 10, 1965.

The statements with which these appellees disagree will be treated in detail below.

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* Unless otherwise stated, the term Rock Island shall include within its meaning Rock Island's wholly owned subsidiary, Pullman Railroad Company.

ARGUMENT.

NO PUBLIC FACILITY INVOLVED.

On page 3 of the Government's Jurisdictional Statement, Lake Calumet Harbor Port is described as a public facility. This is a natural assumption, but contrary to fact. It is important at the outset that this matter be understood for the whole concept of public convenience and necessity can hinge on the distinction between a public and a private facility. The Lake Calumet Harbor Port is not a public facility. The facilities are leased to private operators. In this connection, the manager of the Port District testified as follows:

> "In 1955 the Port District again realized that the concept of the Port District Act had to be changed because it felt its best public interest would be served by having the law changed so that all of the facilities which we were empowered to create, as well as those which we would develop over a period of years, would, by law, be turned into private hands for lease and operation. To the best of our knowledge this is the only port authority or board of its type any place in the world that by law has the right to do this. I think it is important in the procedure for this particular case to understand that these facilities then, while they have been created by municipal action, are not operated by this municipal corporation, that each facility in itself is a separate entity in the hands of a private operator, which, of course, puts an entirely different complexion on this development." (Tr. 41).*

At the time of the hearings before the Commission, the Port District had completed and had in operation two

* (Tr. denotes the transcript of record of the hearing before the Interstate Commerce Commission).

grain elevators, three transit sheds and a backup warehouse. Transit shed No. 1 was leased to the North Pier Terminal Company; transit shed No. 2 was leased to Packers Terminal and Warehousing Company, and shed No. 3 was leased to the Calumet Harbor Terminals. The backup warehouse had been leased to North Pier Terminal and Calumet Harbor Terminals. Elevator No. 1 was leased to the Illinois Grain Company, and the other elevator had been leased to the Rice Powell organization. (Tr. 57.) These industries, which are no different from any other private shipper served by Rock Island, are now served exclusively by Rock Island, and all rail carriers reaching Chicago obtain ready access to them through the switching services of Rock Island. (J. S. App. C, 68a*; 307 I. C. C. 493).

FULL HEARING DENIED.

On page 5 of the Government's Jurisdictional Statement the following statement is made:

> "After a full hearing, the Commission found that there was a need for the proposed service and approved the applications to provide service to the Port District."

These appellees did not receive a full hearing under any stretch of the imagination. This was borne out by the Court below, which said (J. S. App. A, 19a; 241 F. Supp. 974, 983):

> "It is our conclusion that the Commission's failure to give plaintiffs an opportunity to introduce evidence and to cross-examine witnesses in regard to the various managerial and economic aspects of the final plan by which they were bound, constituted a denial to them of due process of law."

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* (J. S. App. denotes an appendix of the Jurisdictional Statement of the railroad appellants).

On page 6 of the Government's Jurisdictional Statement the statement is made that:

> "The Commission had also received evidence of the applicants' plan for operating within the port, as set forth in proposed joint facility and lease agreements between the carriers and the Port District * * *."

But the plan of operation embodied in these agreements differed from the agreement which was finally consummated, and these appellees were not permitted to offer any evidence or cross-examine the applicants' witnesses on this very important aspect of the case. That there was a complete denial of due process was borne out by this statement of the Court below (J. S. App. A, 17a; 241 F. Supp. 974, 982):

> "At the time of the hearing the applicants had not requested the I. C. C.'s permission to operate within the Port District. This failure was due to their belief that such requests were not necessary. The I. C. C. ruled otherwise. As a result of that ruling, the applicants presented evidence at the hearing of a proposed agreement between applicants and the Port District. On the basis of that agreement, and the other evidence presented, the I. C. C. granted the requested authority, contingent upon the proposed plan's being executed.
>
> However, the proposed plan was not executed. Negotiations continued between the applicants and the Port District for several years, with various proposals being considered. Eventually an agreement was reached, and it was upon the basis of this agreement that the I. C. C. finally issued the certificate of public convenience and necessity, without however having granted the parties any further hearings.
>
> One of the provisions of the agreement that was finally consummated governed the rates to be paid by the railroads as rentals to the Port District. The final agreement called for a different formula to be

applied in determining the rentals payable to the Port District by the railroads for the use of the District's property. The final agreement differed from the agreement which had been previously authorized by the I. C. C. in several important particulars, including the economic terms.

Thus we see that the I. C. C., after having said that it would issue a certificate of public convenience and necessity if the proposed plan were adopted, nevertheless granted the certificate in spite of the fact that a different plan was adopted without further hearings."

REAL ISSUE IS PRIVATE INTEREST OF APPELLANT RAILROADS

On page 9 of the Government's Jurisdictional Statement the following appears:

> "This case is of great importance to the shippers and receivers of freight at Lake Calumet Harbor, to the major industrial and grain-producing areas that the port is designed to serve, to the developers of the port, and to nine railroads involved."

These appellees take issue with this statement. The case is of great importance only to the applicant railroads who seek to invade the territory of these appellees. No amount of window dressing can camouflage the fact that this proceeding was initiated by the applicant railroads to force their way into territory served by these appellees for more than 75 years and to carve up that territory among themselves to the consequent injury and damage to these appellees. The record shows that if the applications of the railroad appellants are approved, service to the Port District by the railroad appellants would result in a diversion of traffic and consequent loss of revenues to the Rock Island (J. S. App. C, 99a; 307 I. C. C. 493, 524).

THE COURT DID NOT SUBSTITUTE ITS JUDGMENT FOR THE COMMISSION'S.

On page 11 of the Government's Jurisdictional Statement the following statement is made:

> "Having made all the findings that were necessary and sufficient to uphold the Commission's order, the district court inexplicably concluded that the Commission's order must be reversed because 'this record does not offer ample support in fact and law for the conclusions' of the Commission."

We disagree that the District Court made all the necessary findings to uphold the Commission's order. The Court below did state that certain findings of the Commission were supported by the record. But, the Court then stated that the *conclusions* of the Commission were not supported by fact and law. (J.S. App. A, 13a; 241 F. Supp. 974, 980.) This finding by the Court is certainly not all that is "... necessary and sufficient to uphold the Commission's order..."

The Government makes the further point that to sustain the Commission's determination, the Court need only find "substantial evidence"; that it need not find "ample support"; and that a lack of ample support is not fatal so long as substantial evidence is found. But the Court below also concluded that there was insufficient evidence in the record to sustain the Commission's determination, stating as follows (J. S. App. A, 18a; 241 F. Supp. 974, 982):

> "We have concluded that there is insufficient evidence in the record to support the Commission's determination that a certificate of public convenience and necessity should be granted to the applicants to operate within the Port District."

Again, on page 11 of the Government's Jurisdictional Statement, it is stated that the three-judge Court pointed

to no finding or conclusion of the Commission with which it disagreed. These appellees submit that it is not the function of the three-judge Court to disagree with the findings or conclusions of the Commission, but merely to ascertain if there is sufficient evidence to support the findings and conclusions reached by the Commission. The Court found that the evidence was insufficient.

Regardless of the semantics, the lower Court did point to conclusions of the Commission which it felt were unsupported by the evidence. After stating the major conclusions of the Commission, the Court said (J. S. App. A, 11a; 241 F. Supp. 974, 980):

> "We feel that this record does not offer ample support in fact and law for the conclusions of the Interstate Commerce Commission quoted above."

THESE APPELLEES WERE PREJUDICED BY A DENIAL OF A FULL HEARING.

On page 15 of its Jurisdictional Statement the Government makes the surprising statement that no substantial rights of these appellees were prejudiced by this effort (the termination of the hearing process by the Commission) to streamline and expedite the proceedings. The orders of the Commission deprived these appellees of their property without due process of law in violation of the Fifth Amendment of the Constitution of the United States. The Congressional intent underlying Section 1(18-22) of the Interstate Commerce Act demands a full and complete hearing, and the Commission's order is invalid if such a hearing is denied. Absent a full and complete hearing to the carriers in the field, property rights are taken without due process. The importance of a full hearing was emphasized in the case of *Ohio Bell Telephone Co.* v. *Public Utilities Commis-*

sion, 301 U. S. 292 (1937) wherein the Court stated (pp. 304-305):

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from courts when it has been reached with due submission to constitutional restraints. . . . Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' . . . of a fair and open hearing be maintained in its integrity. . . . The right to such a hearing is one of 'the rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement . . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to rid of harassing delay, when that minimal requirement has been neglected or ignored."

That these appellees were deprived of their constitutional rights was borne out by the Court below when it said (J. S. App. A, 18a and 19a; 241 F. Supp. 974, 983):

> "The plaintiffs, although not parties to the final agreement, will be required to operate under the terms of the agreement entered into between their adversaries and the Port District. They were not given an opportunity to present evidence or to cross-examine the contracting parties concerning the agreement. The fact that the plaintiffs" (these appellees) "did have some opportunity to introduce evidence and to cross-examine in regard to the original proposed agreement does not rectify this omission. The failure to give plaintiffs timely notice before the hearing upon the final agreement was contrary to the Administrative Procedure Act and the rules which Section 1(18) of the Interstate Commerce Act states must be observed; these statutes reflect the constitutional requirements of due process."

DUE PROCESS REQUIRES A REHEARING ON ALL OF THE ISSUES.

On Page 16 of the Government's Jurisdictional Statement, the following is stated: "Should this Court, however, determine that an additional hearing is necessary, we submit that the District Court erred in requiring a 'Complete rehearing * * * upon all of the issues'."

We disagree. The District Court determined that a rehearing is required upon all of the issues for the reason that the operation of railroad services up to the boundaries of the Port District cannot be considered apart from the railroad operation within the Port District (J. S. App. A, 19a; 241 F. Supp. 974, 983).

CONCLUSION.

These appellees again respectfully submit that the appellants have presented no substantial question for the decision of this Court and that the judgment and decree of the District Court should be affirmed.

Respectfully submited,

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